84243-4

NO.

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

61752-4

FEDERAL WAY SCHOOL DISTRICT

Respondent,

vs.

DAVID VINSON,

Petitioner.

APPEAL FROM KING COUNTY SUPERIOR COURT NO. 08-2-05374-1 KNT
COURT OF APPEALS NO. 61752-4-I (DIVISION I)

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner is David Vinson, a teacher who prevailed at a statutory discharge hearing and in Superior Court.

II. CITATION TO THE COURT OF APPEALS DECISION

Petitioner seeks review of Federal Way School District #210, Petitioner, v. David Vinson, Respondent, Case No 61752-4-1 (Appx. A).

III. ISSUES PRESENTED FOR REVIEW

3.1 Should this Court clarify the relation between its precedent in *Hoagland v. Mount Vernon School Dist. No. 320*, 95 Wn.2d 424, 623 P.2d 1156 (1981) and *Clarke v. Shoreline Sch. Dist. No. 412*, 106 Wn.2d 102, 720 P.2d 793 (1986) because Appeals Court precedent now departs significantly from the Supreme Court decisions, the Appeals Court decisions no longer give effect to RCW 28A.405.300 and .310, and the rules from *Hoagland* and *Clarke* are, under existing Appeals Court precedent, impossible to consistently apply?

3.2 Should this Court give effect to RCW 28A.405.340's legislative intent that a school district has no right of appeal from an adverse statutory hearing, or should this Court permit an appeal by way of writ of certiorari as allowed in *Kelso School District No. 453 v. Howell*, 27 Wn. App. 698, 621 P.2d 162 (1980)?

3.3 Should this Court enunciate a clear standard of review for cases in which the school district appeals an adverse statutory hearing by writ of certiorari?

IV. STATEMENT OF THE CASE

David Vinson taught in the Federal Way School District from 1988 until July, 2007, when the District discharged him. CP 32. In those 19 years, Vinson accumulated a track record as a popular and remarkably effective teacher, able to inspire and motivate students of all backgrounds and

achievement levels. Emp. Ex. 23, TR. 359-60.[1]

David Vinson is also openly gay. In January 2005, Vinson filed a complaint with the Federal Way School District alleging sexual and malicious harassment against Thomas Jefferson High School Principal George Ilgenfritz and teacher Christopher Kraght. TR. 393. Vinson alleged that Kraght had, when talking to students, repeatedly made anti-gay remarks targeting Vinson. Emp. Ex. 2 at 2. Vinson alleged that Ilgenfritz had failed to support Vinson when a teacher called Vinson a "flaming faggot" during a school sporting event in 2002, and also that, following the 2002 incident, Ilgenfritz refused to speak to Vinson when he ran into him around the school and targeted Vinson for retaliation by giving him undesirable teaching schedules and imposing unnecessary classroom moves. *Id.* at 3.

A few months earlier, a female teacher had filed a sexual harassment complaint against Ilgenfritz. TR 24-26, 230-32. That complaint was investigated by Chuck Christensen, the District's Executive Director of Human Resources. In the course of that earlier investigation, an administrator told Christensen that Ilgenfritz had referred to Vinson as "that fat gay fucker" and said that he wouldn't hire a lesbian teacher because she was a "dyke" and he "already had enough of those at TJ." TR 74-75, 163-65, 181, 228-32, 255,

[1] Citations to the transcript ("TR") are citations to the transcript of the hearing before Hearing Officer Cooper, included within the Clerk's Papers before this Court but not separately paginated. Unless otherwise noted, citations to exhibits ("Ex.") are to the

261, 280, 393; Emp. Ex. 13, 14. Christensen placed his investigation notes in Ilgenfritz's file in the District Human Resources office, but did nothing further. Id.

When Vinson complained, Christensen assigned the investigation to Courtney Wood, another administrator in the District's Human Resources office. In investigating Vinson's bias complaint, Mr. Wood failed to interview student witnesses Vinson identified, either ignored or failed to discover Christensen's earlier investigation, failed to discover that it was common knowledge among teachers that Ilgenfritz made homophobic and sexist remarks at staff meetings, disregarded student complaints about Kraght's derogatory remarks, and seemed, from the very beginning of the investigation, as if he was "personally invested in the matter" and didn't take Vinson's allegations of homophobia seriously. TR 74-75, 163-65, 181, 228-32, 255, 261, 280, 393; Emp. Ex. 13, 14.

Vinson himself was then disciplined for allegations arising from his complaint, but Ilgenfritz and Kraght were not. Emp. Exh. 11, TR 393, 396 Vinson appealed to an administrative board on which Christensen served, but Christensen never pointed out that Ilgenfritz's anti-gay bias was already documented in his personnel file. Emp. Ex. H. Ilgenfritz and Kraght then made complaints against Vinson, which were again investigated by Mr.

Vinson's hearing exhibits before Hearing Officer Cooper, included within the Clerk's Papers before this Court, Tab E or the District's Exhibits, behind Tab D.

Wood. TR 96-97, 146-47. This time, the investigation was considerably more thorough, and Vinson was transferred to Federal Way High School after Wood found that Vinson had sent Kraght anonymous email criticizing Kraght's performance. Emp. Exh. 11, 12.

Vinson continued to excel as a teacher after his transfer. In his first year in the new placement, he was assigned to teach a class of "level-one WASL students" who were at risk for failing the test. TR 401. Of 75 at-risk students assigned to Vinson that year, 68 passed. *Id.* The next year, Vinson was asked to help create and coordinate the Cambridge Preparatory Academy program at the new school. TR 404. By all accounts, Vinson did a "great job" with the program, and parents of students in the program speak of Vinson in glowing terms. TR 184, 358-61.

Then, in May 2007, Vinson ran into a former student, Rebecca Nistrian, at a Taco Time restaurant. A dispute arose between them, which ended up being of little significance to the outcome of the case, but was the primary reason Vinson was fired.

The day after the incident, Nistrian made a report was to the school district. CP 34. Christensen again assigned the investigation to Courtney Wood. *Id.* In interviews with Wood, Nistrian lied repeatedly about the content, context, and aftermath of the exchange at Taco Time, so much so that the hearing officer in this case entered a finding of fact that Nistrian was

"lacking in credibility." *Id.* Wood then scheduled a meeting for May 22, 2007 to discuss the incident with Vinson. Dist. Ex. 12.

Despite his success at Federal Way High School, Vinson was still stung by the way his harassment complaint and Kraght's counter-complaint had been handled at TJ, and, given the evidence, reasonably believed that Wood, and the District, were biased against him. CP 35. When Wood and Vinson met about Nistrian's complaint, Vinson expressed this concern to Wood at the start of their interview, but Wood ignored him. CP 46; TR 418-19. As a result, Vinson stonewalled and dissembled, at first because Wood was asking about whether Vinson had been at the Taco Time on the wrong date, but partly because he just "wanted him [Wood] to leave me alone." TR 420. Without first explaining what the complaint was about, Wood also mentioned that the police might be involved, causing Vinson to panic and dig in. *Id.*

During the summer of 2007, as the District's investigation proceeded, Vinson continued to work on the Cambridge program—he was never placed on administrative leave because the District had no concern about the quality of his teaching. TR 184-85, 424-25. On July 5, 2007, the District issued a letter of discharge stating that Vinson was being fired for the exchange with Nistrian at Taco Time, for lying to Wood, and for failing to maintain confidentiality about the investigation. Emp. Ex. 18.

Vinson appealed pursuant to RCW 28A.405.300, and on November 27 and 28, 2007 Hearing Officer John G. Cooper presided over the appeal. In his decision, Cooper found that Federal Way had failed to establish sufficient cause to justify termination of Vinson's employment. CP 32. Of the District's grounds for dismissal, Cooper found Vinson's lies to Wood the most troubling, but reasoned that the evidence on Wood's bias was such that Vinson's behavior was understandable in context. CP 44. The hearing officer, applying the 8-factor test from *Hoagland v. Mount Vernon School District*, ruled that the District did not have sufficient cause to discharge Vinson. CP 45-46.

Because RCW 28A.405 grants a school district no right to appeal the hearing officer's determination, Federal Way School District sought review via a writ of certiorari in King County Superior Court. Judge Mary Yu ruled against the District and refused to grant the writ. The District then appealed again to the Court of Appeals, Division I.

By then, Mr. Vinson had found employment with another school, so he waived his right to recover attorneys' fees and rescinded his application for reinstatement, then moved to dismiss the appeal as moot. Division I issued an opinion holding that the case was moot. The District moved for reconsideration. The Court of Appeals granted reconsideration, then issued an opinion holding that the District had sufficient cause to discharge Vinson for

lying to Wood during the investigation.

V. ARGUMENT

Review should be accepted in this case because under RAP 13.4(b), considerations 1, 2, and 4 apply. First, the decision of Division One is in conflict with decisions of the Supreme Court. Second, there is conflict among published Court of Appeals decisions. Third, this petition involves an issue of substantial public interest that should be determined by the Supreme Court.

A. The Decision in *Federal Way v. Vinson* alters Supreme Court precedent such that it cannot be consistently applied and no longer effectuates the purpose of RCW 28A.405.300 and .310.

In its construction of this Court's decisions in *Clarke v. Shoreline School District* and *Hoagland v. Mount Vernon School District*, Division I creates a sufficient cause standard that departs significantly from the Supreme Court precedent, abandons the purpose of RCW 28A.405.300 and .310, and is impossible to consistently apply. For these reasons, the decision of the Court of Appeals in *Vinson* should be reviewed.

1. History of Sufficient Cause

RCW 28A.405.300 and .310 provide that teachers can administratively appeal a school district's discharge decision, and that at the administrative appeal, a neutral hearing officer will determine whether there is sufficient cause for the discharge. The Supreme Court has addressed sufficient cause in three decisions, the most recent of which is 24 years old

now. *Clarke v. Shoreline School Dist. No. 412*, 106 Wn.2d 102, 720 P.2d 793 (1986); *Mott v. Endicott School District No. 308*, 105 Wn.2d 199, 713 P.2d 98 (1986); *Hoagland v. Mount Vernon School Dist. No. 320*, 95 Wn.2d 424, 623 P.2d 1156 (1981).

In *Hoagland v. Mount Vernon School District No. 320*, decided in 1981, a teacher was dismissed after being convicted of grand larceny for possessing a stolen motorcycle. *Hoagland*, 95 Wn.2d at 425-26. After noting that Washington courts have repeatedly held that sufficient cause requires a "showing of conduct which materially and substantially affects the teacher's performance," the *Hoagland* court, drawing on attorney discipline cases and on a line of cases from California and Colorado, set forth eight factors "relevant to any determination of teaching effectiveness, the touchstone of all dismissals." *Hoagland*, 95 Wn.2d at 428-30 (citations omitted).

The *Hoagland* factors were first set forth in a case in which the teacher's misconduct was not school-related, but the *Hoagland* court never stated the factors could be used only to evaluate dismissals in that context. To the contrary, the *Hoagland* court explicitly viewed the factors as a means of determining teaching effectiveness and averting "improvident dismissal and its consequences." *Hoagland*, 95 Wn.2d at 430.

In *Mott*, decided in 1986, the court held that repeatedly striking boys of junior high and high school age in their genitals was not a remediable

teaching deficiency, "lack[ed] any positive educational aspect or legitimate professional purpose," and was "so patently unacceptable that the school district was entitled to discharge the teacher...regardless of prior warnings." *Mott*, 105 Wn.2d at 204 (citing *Pryse v. Yakima Sch. Dist. 7*, 30 Wn. App. 16, 24, 632 P.2d 60 (1981) (sexually suggestive comments and actions directed toward female students are sufficient cause for dismissal as a matter of law); *Potter v. Kalama Pub. Sch. Dist. 402*, 31 Wn. App. 838, 842, 644 P.2d 1229 (1982) (improper physical contact with female students is sufficient cause for dismissal as a matter of law)). The *Mott* court did not apply the *Hoagland* factors because the conduct was not a remediable deficiency. *Id.* at 203-04. *Mott* stands for the proposition that sexual or physical abuse of students is sufficient cause for discharge as a matter of law and the *Hoagland* factors need not be applied in such situations.

In *Clarke*, also decided in 1986, a visually handicapped and hearing-impaired teacher was dismissed for deficiencies in classroom performance. *Clarke*, 106 Wn.2d at 109. Synthesizing several Washington cases, *Clarke* held that "[r]ead together, the general rule emanating from Washington case law is this: Sufficient cause for a teacher's discharge exists as a matter of law where the teacher's deficiency is unremediable and (1) materially and substantially affects the teacher's performance, or (2) lacks any positive educational aspect or legitimate professional purpose." *Clarke*, 106 Wn.2d at

113-14 (citing *Hoagland*, 95 Wn.2d at 428; *Mott*, 105 Wn.2d at 203; *Pryse*, 30 Wn. App at 24; *Potter*, 31 Wn.App at 842).

In a passage that has been the source of much confusion, the *Clarke* court went on to state that the *Hoagland* factors are the proper test for "determining whether a teacher's conduct substantially undermines his effectiveness," that "not all eight factors will be applicable in every teacher discharge case," that "these factors are not necessarily applicable when the cause for dismissal is the teacher's improper performance of his duties," but that "[n]evertheless, these factors are helpful in determining whether a teacher's effectiveness is impaired by his classroom deficiencies." *Clarke*, 106 Wn.2d at 114-15. The *Clarke* court then proceeded to discuss all eight *Hoagland* factors, applying the first, second, third, fifth, and sixth factors as "pertinent" to an analysis of whether Clarke's classroom deficiency "materially and substantially affects his performance as a teacher." *See Clarke,* 106 Wn.2d at 115-18. Thus, in addition to the two-prong rule articulated, *Clarke* stands for the proposition that the *Hoagland* factors may be applied to a teacher's conduct at school, and that not all of the *Hoagland* factors need be applied in every case.

Taken together, *Hoagland, Mott*, and *Clarke* stand for a set of propositions that have generally continued to prevail in Washington's teacher discharge cases. The *Hoagland* factors are used to determine whether

misconduct materially and substantially affects a teacher's performance so as to constitute sufficient cause for discharge. However, in cases of sexual or physical abuse of students, the factors need not be applied because abusive conduct is held to be grounds for discharge as a matter of law.

2. *Vinson* fails to follow the holding of *Clarke*.

Since 1986, the Appeals Court has struggled with the relation between *Hoagland* and *Clarke*, and with how to parse and apply the *Clarke* test.

In *Clarke*, this Court ruled that:

> Sufficient cause for a teacher's discharge exists as a matter of law where the teacher's deficiency is unremediable **and** (1) materially and substantially affects the teacher's performance, (citations omitted), ***or*** (2) lacks any positive educational aspect or legitimate professional purpose. (citations omitted).

Clarke, 106 Wn.2d at 113-114 (emphasis in original). This rule as written has two elements, the second element of which has two prongs. To fulfill the first element, the school district must demonstrate that the teacher's conduct is not remediable. To fulfill the second element, the district must demonstrate either that the deficiency materially and substantially affects the teacher's performance, or that the conduct lacks any positive educational aspect or legitimate professional purpose.

In the present case, Division I, relying on its own decision in *Sauter v. Mt. Vernon School District*, 109 Wn. App. 767, 776, 37 P.3d 354 (1990), holds that whenever a teacher's conduct lacks any positive educational aspect

or legitimate professional purpose, the school district may discharge the teacher without first showing that the teacher's conduct is unremediable. Essentially, the Appeals Court has removed the first element of the *Clarke* test, leaving the second prong of the second element to stand alone. *Vinson* at 8. This is a clear departure from the precedent in *Clarke*. Nor does Vinson clearly explain why the second test as opposed to the first test applies in any given instance.

3. *Vinson* departs from both *Hoagland* and *Clarke* when it limits the application of the *Hoagland* factors.

In *Vinson*, Division I also ruled that it was error of law for the hearing officer to apply the *Hoagland* factors to conduct falling under the second part of the *Clarke* test. *Vinson* at 4.

In support of this alteration of *Clarke* and *Hoagland*, Division I cites a portion of *Ruchert v. Freeman School District,* 106 Wn. App. 203, 213, 22 P.3d 841 (2001) wherein the court states:

> **When the cause for dismissal is based on the employee's job performance, either one or both of the *Clarke* tests may apply. But application of these tests may or may not require consideration of some or all of the *Hoagland* factors.** In contrast, when a school district employee's status or conduct outside his or her job duties is the basis for discharge, the *Hoagland* factors must be considered along with the second *Clarke* test.

Ruchert, 106 Wn. App. at 213 (emphasis added). Division I reads *Ruchert* to mean that it was error for the hearing officer to apply the *Hoagland* factors because "the misconduct here took place at work, on work time, and in

violation of his duties as a district employee..." *Vinson* at 4.

This holding directly contradicts *Hoagland* and *Clarke*, and is not supported by *Ruchert*. *Hoagland* stated that its 8-factor test was a means of effectuating the primary intent of the teacher discharge statutes—avoiding unjust and improvident dismissals. *Hoagland*, 95 Wn.2d at 430. *Clarke* itself applied the *Hoagland* factors to conduct at work, on work time. *Clarke,* 106 Wn.2d at 115-18. *Ruchert* states only that a case "may or may not" require consideration of "some or all" of the *Hoagland* factors when discharge is based upon "job performance," and articulates no basis on which the court is to decide whether or not to apply the factors. *Ruchert* 106 Wn. App. at 213. The only Supreme Court precedent holding that the *Hoagland* factors may be ignored is *Mott*, which dealt with the *sui generis* situation of a teacher physically abusing students by striking their genitals. *Mott*, 105 Wn.2d at 203-04.

4. The existing Appeals Court precedent, including *Vinson*, makes it impossible for teachers and school districts to know when the *Hoagland* factors will be applied.

Neither *Vinson* nor any of the other Supreme Court or Appeals Court precedent articulates a basis for when the 8-factor *Hoagland* test may be used or when the last part of the *Clarke* test must be used alone. The majority in *Vinson* simultaneously concludes that the *Hoagland* factors may be used to evaluate in-school conduct, but that it was an error of law for the hearing

officer to use them that way. *Vinson* at 4. However, under this Court's precedent in *Clarke*, it cannot be error to apply the *Hoagland* factors to in-school conduct—the *Clarke* court itself did that. *Clarke,* 106 Wn.2d at 115-18.

The Vinson majority itself seems to be confused about when or whether the *Hoagland* factors may be used. The *Vinson* majority, in distinguishing or attempting to limit the holding in *Weems v. North Franklin School District*, claims:

> Further, to read *Weems* as the District suggests would eviscerate the line of cases since *Hoagland* and *Clarke*, which ensure that the circumstances of the teachers' conduct may be taken into consideration when a district seeks discharge.

Vinson at 4, fn. 9 (citing *Weems*, 109 Wn. App. 767, 777, 37 P.3d 354 (2002)). Of course, the majority has done just that—in holding that the *Hoagland* factors should not be applied, it has held that the circumstances of the teacher's conduct may not be taken into account when determining whether in-school conduct is sufficient cause for discharge. *Id.*

5. *Vinson*'s alterations of precedent render the protections offered by RCW 28A.405.300 and .310 meaningless.

In adopting the last part of the *Clarke* test standing alone, *Vinson* conflicts with *Clarke* and renders sections of RCW 28A.405.300 and .310 meaningless. RCW 28A.405.300 and .310 provide for a hearing before an independent hearing officer to determine whether the conduct for which the

teacher was dismissed is sufficient cause for the teacher's discharge. This provision for independent review by a hearing officer was added in 1977. Before 1977, the statute provided that the school board would be the final arbiter of sufficient cause.

The amendment of the statute to include an independent hearing officer charged with fact-finding and applying the law indicates a clear legislative intent that the school district should not be the final arbiter of teacher employment. Yet the *Clarke* rule as modified by *Vinson* holds that any time a teacher, in the course of the job, engages in conduct lacking any "positive educational aspect or legitimate professional purpose," that teacher may be discharged. *Vinson* at 4. This creates a per se rule of discharge under which any school-day lapse, no matter how minor, no matter what the context, will always constitute sufficient cause for the teacher's discharge.

This per se rule limits the hearing officer's involvement and discretion, and fails entirely to allow the hearing officer to determine whether the cause or causes on balance constitute *sufficient cause* to discharge as set forth in the clear language of RCW 28A.405.310.[2]

Stated another way, misconduct by its nature is conduct that is less than desirable, usually a mistake of one sort or another. Mistakes will never

[2] RCW 28A.405.310(8): "...Any final decision by the hearing officer...to discharge the employee...shall be based solely upon the cause or causes specified in the notice of probable cause to the employee and shall be established by a preponderance of the evidence at the hearing to be sufficient cause or causes for such action."

serve any "positive educational aspect or serve a legitimate professional purpose." The majority in *Vinson* creates a strict liability rule under which even misconduct having no effect on teaching effectiveness can be the basis for discharge. Say a teacher takes home a packet of Post-It notes for personal use. Is there a positive educational aspect there? No. Is there a legitimate professional purpose? No. Under *Vinson*, that is sufficient cause for discharge. Whenever a teacher tells an untruth, no matter how irrelevant or insignificant, he or she can also be discharged. Say a teacher attends a Tea Party demonstration and doesn't want to let her liberal principal know how she spent her weekend. Is there a positive educational aspect to the lie? No. Is there a legitimate professional purpose? Probably not. The only question for the hearing officer to decide is whether she lied. The construction of *Clarke* by the *Vinson* majority limits the hearing officer's ability to weigh the sufficiency of cause—a matter specifically conferred upon the hearing officer by the legislature.

B. *Kelso* and *Vinson* were erroneously decided and conflict with prior Supreme Court precedent.

Under RCW 28A.405.340, only the teacher has a right of appeal from the hearing officer's decision. Here, the District appealed via a writ of certiorari. However, under this Court's precedent in *State ex rel Bates v. Board of Industrial Insurance Appeals*, 51 Wn.2d 125, 316 P.2d 467 (1957), the Superior Court has no jurisdiction to hear an appeal by writ where the

underlying statute does not grant the state the right of appeal. Id. at 131. The majority in *Vinson* chooses to follow the erroneous decision of *Kelso School Dist. No. 453 v. Howell,* 27 Wn. App. 698, 700-701, 621 P.2d 162, 164 (1980), wherein Division II granted to school districts an appeal by writ. By judicial fiat, the courts in *Kelso* and *Vinson* demolished the careful balance created by the state legislature, and instead granted to school districts the opportunity to endlessly appeal adverse decisions.

As the dissent in *Vinson* persuasively argues, *Kelso* was erroneously decided and purported to overrule binding Supreme Court precedent. In *Bates*, the Department of Labor and Industries sought judicial review of an Industrial Appeals Board decision by the same means employed by the school district in the present case, a writ of certiorari. *Bates*, 51 Wn.2d 125. However, the Industrial Insurance Act provided the department with no right of appeal. The Washington Supreme Court ruled:

> Since the legislature saw fit ... to withhold from the department any right to appeal from the decisions of the board, it follows that, in the absence of some legislative expression indicating a contrary intention, the superior court had no jurisdiction to entertain and grant an application for certiorari which would, in effect, permit the department to do precisely what the legislature has said it may not do, to wit, obtain a review of the board's decision by the superior court.

Bates, 51 Wn.2d at 131-132. This Court should take this opportunity to address the erroneously decided *Kelso* decision and affirm again the

legislature's right to withhold the right of appeal from government agencies when it chooses to do so.

C. The *Vinson* court applied an incorrect standard of review to the Superior Court's decision to deny the writ and to its review of the hearing officer's decision.

This case was before the Appeals Court on an appeal from a denial of a writ of certiorari filed by the District. Appeals on writs of certiorari are subject to the standard of review articulated in the case law on RCW 7.16.120. As the *Vinson* court pointed out, the Superior Court's decision to issue or deny the writ is reviewed for abuse of discretion. *Vinson* at 3

Here, the *Vinson* court concluded that the Superior Court abused its discretion in denying the writ because it was error of law for the hearing officer to conclude there was not sufficient cause for Vinson's discharge. *Vinson* at 3. In holding that the hearing officer's determination on sufficient cause was error of law, the *Vinson* court determined that the hearing officer should not have applied the *Hoagland* factors when weighing Vinson's dismissal, but should instead have applied the second part of the *Clarke* test standing alone. *Id.* at 4. Under the language of the relevant precedent, it cannot be error of law for the hearing officer to have applied the *Hoagland* factors because application of the *Hoagland* factors is, in the precedent cited by the *Vinson* court, entirely discretionary. Id. at 4 *Clarke*'s language on the *Hoagland* factors is discretionary. *Clarke*, 106 Wn.2d at 115 (noting that the

factors are "helpful"). Therefore, the relevant standard is abuse of discretion, not error of law.

Even if it were possible under the existing case law to conclude that it was error of law, rather than abuse of discretion, to apply the *Hoagland* factors, the *Vinson* court also failed to properly review the ultimate determination of sufficient cause. Under *Clarke*, sufficient cause is a mixed question of law and fact. *Clarke*, 106 Wn.2d at 110 ("[t]he question of whether specific conduct ...constitute[s] sufficient cause for discharge is one of mixed law and fact.") On writ of certiorari, the reviewing court determines the law independently, and then applies it to the facts found by the agency. *Thurston County v. Cooper Point Ass'n,* 148 Wn.2d 1, 8, 57 P.3d 1156 (2002). Under writ of certiorari, "[i]ssues of fact are reviewed to determine whether they are supported by competent and substantial evidence. This review is deferential and requires the court to view the evidence and reasonable inferences therefrom in the light most favorable to the party who prevailed" below. *Development Services of America, Inc. v. City of Seattle*, 138 Wn.2d 107, 979 P.2d 387 (1999). The reviewing court cannot re-weigh the evidence on certiorari or disregard the agency's findings. *State v. Johnson*, 109 Wn. 214, 186 P. 671 (1919).

Here, the facts as found by the hearing officer were that Nistrian was not credible and that Vinson had plausible reasons for failing to cooperate in

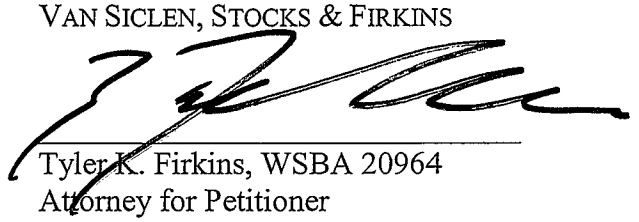
the District's investigation, and that the investigation was not fair and impartial. CP 33 and 35. In both its recitation of facts and in its holding, the *Vinson* court simply ignores these factual determinations. *Vinson* at 1, 4. In holding that Vinson's actions during the investigation were sufficient cause for termination, the Appeals Court stated that "Vinson's concern with the investigation's impartiality...may or may not have been founded." *Id.* at 4. It was the hearing officer's conclusion that the investigation was biased and that Vinson's concerns were founded. The reviewing court is not free to simply ignore this fact. As a result, the *Vinson* court applied an incorrect standard of review by applying the law it found to a body of facts not found by the hearing officer. This violates the relevant Supreme Court precedent. In so doing, the *Vinson* court impermissibly substituted its judgment for the judgment of the hearing officer.

VI. CONCLUSION

Review should be accepted in this case because under RAP 13.4(b), considerations 1, 2, 3 and 4 apply.

DATED this the 24th day of February, 2010

VAN SICLEN, STOCKS & FIRKINS



Tyler K. Firkins, WSBA 20964
Attorney for Petitioner

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that the following is true and correct.

1. I am employed by the law offices of Van Siclen, Stocks & Firkins.

2. On February 24, 2010, I caused to be served a true and correct copy of the Petition for Review on the following via ABC Legal Messenger:

Jeffrey Ganson
Dionne & Rorick
601 Union St., Ste. 900
Seattle, WA 98101

DATED this 24th day of February, 2010 at Auburn, Washington.

Diana Butler

Diana M. Butler

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

FEDERAL WAY SCHOOL DISTRICT NO. 210, Appellant, v. DAVID VINSON, Respondent.	)	No. 61752-4-I DIVISION ONE PUBLISHED OPINION FILED: January 25, 2010

APPELWICK, J. — This case arises from a notice of probable cause for discharge issued to Vinson, a teacher, by the Federal Way School District. The notice was based on alleged harassment of and retaliation against a former student, and dishonesty during the investigation of those allegations. Vinson filed an administrative appeal, during which he admitted he lied in the course of the investigation. A hearing officer found that Vinson's misconduct, while improper, was not sufficient cause for termination. The District then sought review via a statutory writ of review, pursuant to RCW 7.16.040. The superior court denied the writ and affirmed the hearing officer. The District filed a notice of appeal of the court's decision.

Dishonesty by a certified teacher during the course of an official school district investigation lacks any professional purpose as a matter of law, and is sufficient cause for termination. The superior court abused its discretion in denying the writ. We reverse the trial court's denial of the writ and vacate the order affirming the hearing officer and awarding attorney fees. We remand with direction to the superior court to enter an order reversing the decision of the hearing officer.

FACTS[1]

On May 1, 2007, David Vinson, a teacher at Federal Way High School, encountered Rebecca Nistrian, a former student, at Taco Time in Federal Way.[2] Nistrian and Vinson's accounts of the Taco Time encounter differ. Vinson claims that Nistrian approached him asking "[h]ey, Mr. V., why aren't you at TJ [Thomas Jefferson High School] anymore?" to which Vinson responded, "[d]on't talk to me ever again, you fucking bitch." Nistrian then told him to "fuck off," and Vinson responded by calling her a "bitch" and a "whore."

Nistrian claims that she said "[h]i" to Vinson, at which point he called her names including "slut," "tramp," "whore," "bitch," and "hussy." Nistrian also alleges that Vinson threatened to come to her place of business, The Red

[1] The District does not challenge the hearing officer's findings. The fact summary is based on those unchallenged factual findings. See, e.g., Weems v. N. Franklin Sch. Dist., 109 Wn. App. 767, 776, 37 P.3d 354 (2002) (unchallenged findings are verities on appeal).

[2] Nistrian had participated in an investigation regarding a harassment complaint filed against Vinson by Christopher Kraght, another teacher, in 2005. As a disciplinary measure, Mr. Vinson was transferred from Thomas Jefferson High School to Federal Way High School. Just before the harassment complaint against Vinson, Vinson had filed a sexual and malicious harassment complaint against George Ilgenfritz, then the principal of Thomas Jefferson High School, and Kraght. Vinson's claim was not upheld.

Lobster, and be a difficult customer. Nistrian had previously called Vinson, who is openly gay, a "faggot."

Nistrian reported the Taco Time incident to the executive director of human resources for the Federal Way School District (District), who assigned investigation of the claim to Courtney Wood. Wood had been the investigator on Kraght's harassment complaint against Vinson in 2005, as well as on Vinson's harassment complaint against Ilgenfritz and Kraght. On May 22, 2007, Wood began interviewing Vinson, whereupon Vinson told Wood that he did not feel the investigation could be impartial, and that he felt bullied by Wood. The investigation continued nevertheless. Both Vinson and Nistrian ultimately admitted to lying during the course of the investigation by Wood.

On July 5, 2007, the District issued to Vinson a letter of probable cause for discharge from employment pursuant to RCW 28A.405.300.[3] In the letter, the District stated that its investigation provided probable cause for termination, based on (1) retaliation and harassment against Nistrian for participation in the 2005 harassment claim investigation, and (2) dishonesty during the course of investigation into the Taco Time incident.[4]

[3] According to RCW 28A.405.300, if "it is determined that there is probable cause or causes for a teacher . . . holding a position as such with the school district . . . to be discharged . . . , such employee shall be notified in writing of that decision, which notification shall specify the probable cause or causes for such action."

[4] A third basis stated in the letter was Vinson's insubordination by reason of contacting two colleagues, by phone and e-mail, during the course of the investigation. The parties do not discuss this issue in the briefing.

Vinson requested a hearing pursuant to RCW 28A.405.310 to contest his termination. The hearing took place before Hearing Officer John Cooper on November 27 and November 28, 2007.

The hearing officer found that Vinson had lied in his initial responses to Wood's questions about the incident, which Wood had framed as events occurring on May 2, 2007, when Vinson knew they had taken place on May 1. Instead of correcting Wood on the date, Vinson answered "no" to these questions. The hearing officer also found that Vinson had continued to deny knowledge even when Woods changed the questions such that they required a "frank admission." The hearing officer entered a specific finding that "Mr. Vinson admits that he had lied in response to certain questions posed to him by Mr. Wood during the course of the investigation." However, the hearing officer found that Vinson presented plausible reasons for his lack of candor, not least of which was his perception that the investigation by Wood was not impartial.

The hearing officer found Nistrian's testimony "to be lacking in credibility," as several witnesses testified that she is a known liar, and she admitted during the investigation that she had lied about seeking an anti-harassment order against Vinson.

Although the hearing officer commented on the impropriety of Vinson's conduct—that it was "troubling and should never have occurred"—the hearing officer concluded that the District had failed to demonstrate by a preponderance of the evidence that probable cause existed for termination of Vinson's

employment. The hearing officer also found that the conduct cited in the termination letter did not and would not have an adverse impact upon his teaching effectiveness or performance. Therefore the conduct did not violate RCW 28A.405.300.

The District sought a writ of review pursuant to RCW 7.16.040 in King County Superior Court.[5] The court found that that the District had failed to meet the requirements for a grant of statutory certiorari and denied the writ, affirming the decision of the hearing officer. It ordered the District to pay Vinson's attorney fees, incurred in the underlying hearing, in the amount of $38,773.67.

The District appealed the trial court's order and judgment denying the writ and affirming the decision of the hearing officer. After submitting his briefing, Vinson withdrew his request for reinstatement, waived the award of attorney fees, and asked this court to dismiss the appeal as moot. A commissioner ruled that the issue of mootness was to be argued at the hearing on the merits.

Following oral argument, we issued an opinion stating that because the parties had settled the case was moot, so the court no longer had jurisdiction. However, the District's motion for reconsideration correctly noted that the parties had not settled. Rather, Vinson had unilaterally withdrawn his request for reinstatement and waived his right to attorney fees. We granted the motion for reconsideration and withdrew our original opinion.

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[5] Only employees, and not the District, have a right to appeal the hearing officer's decision under RCW 28A.405.320. See, e.g., Hall v. Seattle Sch. Dist. 1, 66 Wn. App. 308, 310, 317, 831 P.2d 1128 (1992); Coupeville Sch. Dist. No. 204 v. Vivian, 36 Wn. App. 728, 730, 677 P.2d 192 (1984).

DISCUSSION

The basis for granting the statutory writ is established in RCW 7.16.040:

> A writ of review shall be granted by any court, except a municipal or district court, when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law.

Commanda v. Cary, 143 Wn.2d 651, 655, 23 P.3d 1086 (2001). The superior court's decision to issue a writ is reviewed for an abuse of discretion. See, id. at 654–57. Issues of law are reviewed de novo to determine whether the decision below was contrary to law. RCW 7.16.120(3); Sunderland Family Treatment Servs. v. City of Pasco, 127 Wn.2d 782, 788, 903 P.2d 986 (1995). Issues of fact are reviewed to determine whether they are supported by competent and substantial evidence. RCW 7.16.120(4); Sunderland, 127 Wn.2d at 788.

The District asked the court to determine whether, under RCW 7.16.120(3),[6] the hearing officer had erred as a matter of law on the issue of sufficient cause, prejudicing the District. If the District succeeded on the merits, the trial court could have provided relief by reversing the hearing officer's decisions on sufficient cause and reinstatement. However, the trial court denied the writ, finding that the District had failed to meet the requirements of the writ.

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[6] RCW 7.16.120, the statutory writ of review, provides, inter alia:

> The questions involving the merits to be determined by the court upon the hearing are:
>
> . . .
>
> (3) Whether, in making the determination, any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the relator.

The trial court affirmed the decision of the hearing officer and awarded attorney fees to Vinson.[7]

I. Sufficient Cause

The District asserts that the hearing officer erred as a matter of law by concluding that Vinson's dishonesty during investigation did not constitute sufficient cause for discharge. The petition alleged, inter alia, that Vinson lied in the course of the investigation of the alleged misconduct; that lying provided sufficient cause to terminate under RCW 28A.405.300 and Clarke v. Shoreline Sch. Dist. No. 412, 106 Wn.2d 102, 113–14, 720 P.2d 793 (1986); that the hearing officer acted unlawfully in holding that Vinson's dishonesty did not establish sufficient cause; and that it had no right to appeal under RCW 28A.405 and Coupeville Sch. Dis. 204 v. Vivian, 36 Wn. App. 728, 730 (1984).

Vinson does not dispute the District lacked a right of appeal under the statute. Hence, the sole question in determining whether the trial court abused its discretion by denying the writ is whether the hearing officer erred as a matter of law on sufficient cause.[8] Sunderland, 127 Wn.2d at 788.

[7] This decision became a final judgment and was appealed pursuant to RCW 7.16.350 and RAP 2.2(a)(1) ("The final judgment entered in any action or proceeding, regardless of whether the judgment reserves for future determination an award of attorney fees or costs."). RAP 2.1(b) provides "[t]he procedure for seeking review of trial court decisions established by these rules supersedes the review procedure formerly available by extraordinary writs of . . . certiorari." Therefore, our jurisdiction to hear the case falls under RAP 2.1(a)(1), review as a matter of right.
[8] The District does not request that we determine other questions under RCW 7.16.120.

In determining whether sufficient cause for discharge exists, the inquiry centers on whether the teacher has materially breached his promise to teach so as to excuse the school district in its promise to employ. Barnes v. Seattle Sch. Dist. No. 1, 88 Wn.2d 483, 487, 563 P.2d 199 (1977). Specifically, sufficient cause for a teacher's discharge exists as a matter of law where the teacher's deficiency is unremediable and materially and substantially affects the teacher's performance, *or* lacks any positive educational aspect or legitimate professional purpose. Clarke, 106 Wn.2d at 113–14; Weems v. N. Franklin Sch. Dist., 109 Wn. App. 767, 776, 37 P.3d 354 (2002); Sauter v. Mt. Vernon Sch. Dist. No. 320, 58 Wn. App. 121, 130–31, 791 P.2d 549 (1990) (examining the Clarke rule and determining that the Clarke court did not intend that remediability apply to both of Clarke's tests for sufficient cause). Remediability applies only to a deficiency that materially and substantially affects the teacher's performance, not if the conduct lacks any positive educational aspect or legitimate professional purpose. Sauter, 58 Wn. App. at 130–31.

In Hoagland v. Mount Vernon School District No. 320, 95 Wn.2d 424, 429–30, 623 P.2d 1156 (1981), the Washington Supreme Court enunciated eight factors for consideration in teacher discharge cases. The Hoagland factors are relevant to any determination of teaching effectiveness, because teaching effectiveness "'is the touchstone for all dismissals.'" Clarke, 106 Wn.2d at 114 (quoting Hoagland, 95 Wn.2d at 429–30). In determining whether a teacher's

conduct substantially undermines his effectiveness, thereby justifying discharge, a court must consider the propriety of the dismissal in light of:

> (1) the age and maturity of the students; (2) the likelihood the teacher's conduct will have adversely affected students or other teachers; (3) the degree of the anticipated adversity; (4) the proximity or remoteness in time of the conduct; (5) the extenuating or aggravating circumstances surrounding the conduct; (6) the likelihood that the conduct may be repeated; (7) the motives underlying the conduct; and (8) whether the conduct will have a chilling effect on the rights of the teachers.

Hoagland, 95 Wn.2d at 429–30. Not all eight factors will be applicable in every teacher discharge case. Clarke, 106 Wn.2d at 114. The factors were designed to ensure that if a teacher's conduct *outside* his profession is the basis for his dismissal, the conduct has some nexus to his performance of his duties as a teacher. Hoagland, 95 Wn.2d at 428. Nevertheless, these factors may be helpful in determining whether a teacher's effectiveness is impaired by his classroom deficiencies. Clarke, 106 Wn.2d at 114–15. The interplay of the two Clarke tests and the Hoagland factors is as follows:

> When the cause for dismissal is based on the employee's job performance, either one or both of the Clarke tests may apply. But application of these tests may or may not require consideration of some or all of the Hoagland factors. In contrast, when . . . a[n] employee's status or conduct outside his or her job duties is the basis for discharge, the Hoagland factors must be considered along with the second Clarke test.

Ruchert v. Freeman Sch. Dist., 106 Wn. App. 203, 213, 22 P.3d 841 (2001).

Because the misconduct here took place at work, on work time, and in violation of his duties as a district employee to cooperate with the investigation of other alleged misconduct, the admitted dishonesty during the investigation does

not require the application of the Hoagland factors. Notwithstanding Vinson's concern with the investigation's impartiality, which may or may not have been founded, Vinson's choice to lie during the course of an official investigation was improper. We hold that, under the second Clarke test, lying during the course of an official investigation of professional misconduct lacks any professional purpose and is sufficient cause for termination as a matter of law.[9]

Therefore, the hearing officer's decision contained an error of law on sufficient cause. The trial court abused its discretion by denying the writ. Further, it had no authority to award attorney fees.[10] Finally, it lacked authority to

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[9] The District asserts that *any* dishonesty is sufficient grounds for discharge under Weems as a matter of law. We decline to reach such a broad holding.

In Weems, Dr. Weems created and falsified documents in order to feign compliance with special education regulations. 109 Wn. App. at 777. The issue presented was whether Weems's conduct was adequate grounds for termination, because the conduct lacked any positive educational aspect or legitimate professional purpose (the second Clarke test). Weems, 109 Wn. App at 770. The court upheld the hearing officer's conclusion that falsification of documents served no educational or legitimate professional purpose, and was therefore sufficient cause to discharge. Id. The court did go on to say that "It [the conduct] was dishonest. And there is no reason for dishonesty in any work place." Id. at 777. The District argues that this last sentence is part of the court's holding, and therefore stands for the proposition that dishonesty and lying to one's employer is grounds for discharge as a matter of law—that there is never justification for dishonesty by a teacher to his employer. Vinson responds that this language is dicta.

Weems's holding is not as broad as the District would have it. The court arrived at the holding in Weems from an application of the second Clarke test. Id. at 776–77. The legal conclusion of the hearing officer, which became the holding of the Weems court, was that the teacher's falsification of documents in order to feign compliance with state and federal special education regulations served no educational or legitimate professional purpose, and therefore was sufficient grounds for discharge. Id. at 777. Weems was not creating a new test that would supplant the well-established Clarke test. The Clarke test already allows a hearing officer to find that, as a matter of law, dishonest conduct lacks any positive educational aspect or legitimate professional purpose. While we hold that lying during the course of the investigation is sufficient cause for termination, our holding stems from the application of the Clarke test to the facts before us.

Further, to read Weems as the District suggests would eviscerate the line of cases since Hoagland and Clarke, which ensure that the circumstances of a teacher's conduct may be taken into consideration when a district seeks discharge.

[10] The trial court may award attorney fees in an appeal by a teacher under RCW 28A.405.350. Chapter 28A RCW contains no such provision for the District to appeal. Here, the District sought a writ of review under chapter 7.16 RCW, which does not provide for attorney fees for the prevailing party.

affirm the hearing officer by virtue of its denial of the writ.[11] Because the error of law is dispositive of the appeal, there is no need to remand.

We reverse the trial court's denial of the writ and vacate the order affirming the hearing officer and awarding attorney fees. We remand with direction to the superior court to enter an order reversing the decision of the hearing officer.

II. Mootness

This case was not moot when the trial court denied the writ. After the parties had submitted their briefing on appeal, Vinson withdrew his request for reinstatement, waived the award of attorney fees, and asked this court to dismiss the appeal as moot. However, Vinson has not stipulated that there was sufficient cause for his termination. Nor did the parties agree to vacate the entire action.

The District argues that the case is not moot, because it is still bound by the hearing officer's determination that it lacked sufficient cause to terminate Vinson and because Vinson has filed a separate lawsuit for damages, relying upon the decision of the hearing officer as the basis for his wrongful termination claim. Vinson has admitted he filed such an action. The District argues that the "prejudice suffered . . . as a result of the [h]earing [o]fficer's erroneous decision will continue, in the form of the District being required to defend an action based on that decision."

[11] When a superior court acts in an appellate capacity in a statutory writ proceeding it has only such jurisdiction as is conferred by law. Deschenes v. King County, 83 Wn.2d 714, 716, 521 P.2d 1181 (1974); KSLW v. City of Renton, 47 Wn. App. 587, 595, 736 P.2d 664 (1986). If a court lacks jurisdiction over a writ proceeding, it "may do nothing other than enter an order of dismissal." Deschenes, 83 Wn.2d at 716.

"A case is moot if a court can no longer provide effective relief." Orwick v. City of Seattle, 103 Wn.2d 249, 253, 692 P.2d 793 (1984). We agree with the District that the case is not moot; we are still in position to award relief to the District.[12] The hearing officer's decision that the District lacked sufficient cause to discharge under Clarke was wrong as a matter of law. Vinson's waiver of reinstatement and award of attorney fees relieved the District of two immediate consequences of the hearing officer's erroneous decision, but not of the erroneous decision itself, or of any other collateral consequences that flow from it.

A judgment or administrative order becomes final for preclusion purposes at the beginning, not the end, of the appellate process, although res judicata or collateral estoppel can still be defeated by later rulings on appeal. Nielson v. Spanaway Gen. Med. Clinic, Inc., 135 Wn.2d 255, 264, 956 P.2d 312 (1998); Lejeune v. Clallam County, 64 Wn. App. 257, 265–66, 823 P.2d 1144 (1992). The District now faces the possibility of collateral estoppel[13] on the sufficient cause issue in Vinson's separate wrongful termination action against the District. It is also possible the determination would have collateral consequences in subsequent discharge actions of other employees of the District or otherwise.

[12] Further, whereas the District's satisfaction of the requirements of the writ under RCW 7.16.040 is jurisdictional for the trial court, it is not for us. RCW 7.16.350.

[13] Before the doctrine of collateral estoppel may be applied, the party asserting the doctrine must prove: (1) the issue decided in the prior adjudication is identical with the one presented in the second action; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) application of the doctrine does not work an injustice. Nielson, 135 Wn.2d at 262–63.

The District argues that even if the case is moot we should apply the doctrine of equitable vacatur to the hearing officer's decision to avoid any collateral consequences of the unreviewed decision, or we should reach the merits under the Westerman public interest exception.

Were we to accept Vinson's contention that the case is moot, we are persuaded this is an appropriate case to invoke the doctrine of equitable vacatur. A court may apply the doctrine of equitable vacatur where judgments have become moot but may nonetheless have preclusive effect. See Ctr. for Biological Diversity v. Lohn, 511 F.3d 960, 965 (9th Cir. 2007) (vacating trial court's judgment in moot case "'is commonly utilized . . . to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences'") (quoting United States v. Munsingwear, Inc., 340 U.S. 36, 41, 71 S. Ct. 104, 95 L. Ed. 36 (1950)). In Washington, a judgment in a case that has subsequently become moot may be preclusive if left of record. See Nielson, 135 Wn.2d at 263–64; cf. Sutton v. Hirvonen, 113 Wn.2d 1, 9–10, 775 P.2d 448 (1989) (vacatur necessarily eliminates preclusive effect of judgment). Under this doctrine, we would vacate the hearing officer's decision.

Further, if equitable vacatur were unavailable, we would nonetheless reach the question of whether sufficient cause for discharge exists when a teacher is dishonest during the course of an official school investigation under the Westerman public policy exception. Westerman v. Cary, 125 Wn.2d 277, 286–87, 892 P.2d 1067 (1994) (an appellate court, at its discretion, may decide

an appeal that has otherwise become moot when it involves matters of continuing and substantial public interest). "The three factors considered essential" for application of the public interest exception "are: (1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur." Hart v. Dep't of Soc. & Health Servs., 111 Wn.2d 445, 448, 759 P.2d 1206 (1988). The issue is of a public nature and may very well recur, and its resolution will assist school districts and hearing officers in termination cases.

We hold that dishonesty by a certified teacher during the course of an official school district investigation lacks any professional purpose as a matter of law, and is therefore sufficient cause for termination under Clarke. The superior court abused its discretion in denying the District's writ.

We reverse the trial court's denial of the writ and vacate the order affirming the hearing officer and awarding attorney fees to Vinson. We remand with direction to the superior court to enter an order reversing the decision of the hearing officer.

Applewick, J.

WE CONCUR:

Leach, J.

Federal Way School District No. 210 v. Vinson
No. 61752-4-I

DWYER, A.C.J. (dissenting) — The majority opinion understandably relies on the decision in Kelso School District No. 453 v. Howell, 27 Wn. App. 698, 621 P.2d 162 (1980), for the proposition that the Federal Way School District is entitled to seek judicial review of the administrative decision herein by means of a statutory writ of review. Because I believe the Kelso[1] case to have been wrongly decided, because the majority logically applies the Kelso decision so as to reach an unfair and absurd result as to a teacher's entitlement to an award of attorney fees in disputes of this type, and because all of this arises in the context of a moot case, I dissent.

I

Precedent of this court should be overruled only when it is both incorrect and harmful. State v. Stalker, 152 Wn. App. 805, 811–12, 219 P.3d 722 (2009). This test is met with regard to the Kelso decision.

School districts are inventions of the legislature. As stated several decades ago by our Supreme Court:

> School districts are municipal or quasi-municipal corporations. They are created by the legislature and can exercise only such powers as the legislature has granted in express words, or those necessary or fairly implied in, or incident to, powers expressly granted or those essential to the declared objects and purposes of such district.

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[1] The Kelso decision was followed (without discussion) in Coupeville School District No. 204 v. Vivian, 36 Wn. App. 728, 677 P.2d 192 (1984), cited by the majority. Majority at 5 n.5.

Noe v. Edmonds Sch. Dist. No. 15, 83 Wn.2d 97, 103, 515 P.2d 977 (1973) (citations omitted). As the majority opinion readily admits, the legislature has specifically allowed a teacher to seek judicial review of a hearing officer's decision in a dispute of this type while simultaneously declining to authorize a school district to do so. RCW 28A.405.320. Unquestionably, the legislature's will was that school districts not have the right to seek review in superior court in cases of this type.

Notwithstanding this clear legislative policy decision, the Kelso court held that school districts could seek judicial relief by means of a statutory writ of certiorari. Kelso, 27 Wn. App. at 701. In so holding, the court focused solely on the nature of the underlying administrative proceeding, which it noted was "quasi-judicial in nature," Kelso, 27 Wn. App. at 701, but did not analyze the question in light of the nature of the party seeking review. Simply put, the Kelso court did not confront the true issue presented: was granting a right to judicial review to the school district, in the face of a plain, clear legislative determination to the contrary, an improper affront to the powers and prerogatives of the legislature?

This was most unfortunate because clear Supreme Court precedent leading to a contrary conclusion had long been extant at the time of the Kelso decision.

In State ex rel. Bates v. Board of Industrial Insurance Appeals, 51 Wn.2d 125, 316 P.2d 467 (1957), the Supreme Court addressed a similar situation. In that case, the Department of Labor and Industries sought judicial review of an Industrial Appeals Board decision by means of a writ of certiorari, notwithstanding a provision of the Industrial Insurance Act providing that the department had no right to appeal to the

superior court from a decision of the board. The Supreme Court determined that review by writ was not available to the department:

> Since the legislature saw fit . . . to withhold from the department any right to appeal from the decisions of the board, it follows that, in the absence of some legislative expression indicating a contrary intention, the superior court had no jurisdiction to entertain and grant an application for certiorari which would, in effect, permit the department to do precisely what the legislature has said it may not do, to wit, obtain a review of the board's decision by the superior court.

Bates, 51 Wn.2d at 131.

In reaching its contrary conclusion, the Court of Appeals' decision in Kelso did not discuss the Supreme Court's decision in Bates. Similarly, no later appellate court decision relying on the authority of Kelso has discussed the holding in Bates.

The Supreme Court stated the law in Bates 23 years prior to the Kelso decision. In light of the Bates holding, Kelso was improperly decided.

II

One harmful effect of the Kelso decision, of course, is that it stands as an affront to the legislature. A second harmful effect also manifests itself in the majority opinion: applying Kelso leads to unfair, absurd results. These results, unfortunately, also stand in contravention to the legislature's will.

In discussing Vinson's request for an award of attorney fees, the majority reaches an absurd conclusion. Had Vinson lost at the administrative hearing and appealed pursuant to RCW 28A.405.320, he would be entitled to an award of attorney fees in the event that he prevailed on appeal. Such a result was provided for by the legislature.

In this case, however, Vinson won at the administrative hearing. The district—not Vinson—initiated judicial review. According to the majority opinion, under these circumstances, a prevailing teacher can never qualify for an award of attorney fees. See majority at 10 n.10. Thus, the majority concludes that the legislature's will is to allow an award of attorney fees to a teacher who loses at the administrative level but prevails in court but to deny such an award to a teacher who prevails both at the administrative level and in court. Having started with a false premise (that the legislature wants school districts to avail themselves of writs of review) the majority arrives unerringly at this absurd conclusion. The continuing harm of the wrongly-decided Kelso decision is manifest.

III

My disaffection with the majority opinion becomes complete when I observe that this case is moot.

After the parties submitted their briefing, Vinson withdrew his request for relief. Therefore, the requirement of RCW 7.16.120 (3), that the rights of the district have been violated to its prejudice, cannot be met. There is no ongoing dispute. There is no true prejudice to the district.

The district's claim that, in other litigation, it may be collaterally estopped from defending the propriety of Vinson's discharge is unavailing. We have previously held that "[e]ven though an issue was essential to the judgment, was actually litigated, and was embodied in a valid final judgment, we will not deny a party the chance to litigate the issue if it was statutorily denied an opportunity to appeal." State Farm Mut. Auto. Ins. Co. v. Avery, 114 Wn. App. 299, 309, 57 P.3d 300 (2002). Here, Vinson deprived

the case of its controversy, rendering the district unable to obtain complete appellate review. Collateral estoppel would not apply in later litigation. The district is not prejudiced by the administrative decision. The case is moot.

IV

Because the district should not be allowed to obtain review by statutory writ, because allowing the district to do so distorts the legislature's will with regard to attorney fee awards in cases of this type, and because this case is moot, I respectfully dissent.

Dwyer, A.C.J.